Court File No.: A-83-23

FEDERAL COURT OF APPEAL

ROBIN FRANCIS

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

NOTICE OF APPLICATION

(APPLICATION UNDER SECTIONS 18.1 AND 28(1)(g) OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, C. F-7)

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of the hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or another acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of the Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: MAR 22 2022

Issued by: _____
(Registry Officer)

REBECCA DUONG
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office:

[redacted]
Toronto, Ontario
[redacted]

TO: Canada Employment Insurance Commission
c/o Rebekah Ferriss
Department of Justice Canada
ESDC – Legal Services Unit
[redacted]

T: [redacted]

[redacted]

Counsel for the Respondent, Canada Employment Insurance Commission

AND TO: The Social Security Tribunal of Canada
c/o Richard Lefebvre
Manager
Operations Appeal Division
Social Security Tribunal
[redacted]

[redacted]

AND TO: The Attorney General of Canada
c/o Office of the Deputy Attorney General of Canada
[redacted]

and

Ontario Regional Office
Department of Justice Canada
[redacted]

T: [redacted]

[redacted]

APPLICATION

OVERVIEW

1. This is an application for judicial review in respect of a decision rendered by the Appeal Division of the Social Security Tribunal of Canada (the "**Tribunal**") (the "**Decision**").

2. Appeal Division Member Charlotte McQuade rendered the Decision on February 17, 2023, in which she dismissed an appeal (bearing Tribunal File No. AD-22-626) brought by the applicant, Robin Francis (the "**Applicant**"), against the Canada Employment Insurance Commission (the "**Commission**"). The Decision was rendered in respect of an earlier decision, itself rendered on July 26, 2022 by General Division Member Solange Losier. Member Losier's decision upheld the Commission's denial of the Applicant's claim for employment insurance benefits ("**EI Benefits**") available under the *Employment Insurance Act*, SC 1996, c. 23 (the "**EI Act**").

3. The Decision was first communicated by the Tribunal to the Applicant by e-mail to the Applicant's counsel dated February 20, 2023. The e-mail advised, "*This email and its attachment(s) are considered received the day after we send them.*" Accordingly, the Decision is deemed to have been received by the Applicant on February 21, 2023. Accordingly, the 30-day deadline for filing of this Notice of Application, as set out in section 18.1(2) of the *Federal Courts Act*, R.S.C. 1995, c. F-7, expires on March 23, 2023.

STATEMENT OF RELIEF SOUGHT

4. The Applicant makes application for an order:

(a) granting this application for judicial review;

(b) setting aside the Decision and directing the Commission to accept the Applicant's claim for EI Benefits and to pay the Applicant all such amounts to which he would have been entitled, from the date of his original application until now;

(c) alternatively, referring this matter back to the Appeal Division of the Tribunal for reconsideration in accordance with such directions as this Court is minded to provide; and

(d) providing such further and other relief as counsel may advise and this Court consider appropriate.

GROUNDS FOR THE APPLICATION

5. The grounds for the application are as set out in the following paragraphs.

Underlying Facts Leading to the Applicant's Termination and EI Benefits Claim

The Applicant's Employment with London Health Sciences Centre

6. The Applicant's claim for EI Benefits arose from the termination of his employment with the London Health Sciences Centre ("**LHSC**") on October 13, 2021.

7. The Applicant's first day working with LHSC was June 3, 2015. He was employed as a Decision Support Consultant.

8. The Applicant's evidence was that since mid- 2020 he had been working from home – all team meetings and work were being done online.

9. There is nothing in the record to suggest that LHSC was in any way dissatisfied with the Applicant's normal job performance, or that there were any grounds for dismissal. On the contrary, the evidence demonstrates that the Applicant was a diligent and hard worker who was praised for his attendance record.

The LHSC Policy

10. On August 31, 2021, as the Applicant continued to work from home, LHSC sent an e-mail to employees, informing them of a forthcoming policy (the "**LHSC Policy**").

11. The LHSC Policy was introduced on September 3, 2021. It provided, in relevant part, as follows:

> LHSC staff and affiliates will:
>
> - Complete a COVID-19 Vaccination e-learning program
> - Provide documentation of all required COVID vaccination doses to Occupational Health and Safety Services (OHSS) or
> - Provide valid documentation of a medical exemption to Occupational Health and Safety Services or
> - Provide documentation for an exemption under Human Rights to People Services
> - Conduct a self-administered COVID-19 rapid antigen test and document results prior to attending work, if an approved exemption is documented. This testing is not a replacement for being fully vaccinated but may play a role in the accommodation process. Beginning October 22, 2021, only those with a valid medical exemption or those with exemption under the Human Rights code will be provided this accommodation.
>
> [...]
>
> 1. Staff and Affiliates who are deemed to be not vaccinated may be accommodated per this policy due to: A confirmed medical contraindication (from an attending Physician/Nurse Practitioner reviewed by OHSS), or
> 2. A reason that is verified as applicable under the Ontario Human Rights Code
>
> [...]

12. The LHSC Policy ambiguously went on to provide two different disciplinary outcomes for failing to comply with the Policy. **First**, if a person chose to remain unvaccinated without a medical or human rights exemption, the Policy provided that such a person ***would not be terminated*** but would be placed on ***unpaid leave***.

13. **Second**, with respect to persons using COVID-19 rapid test kits for self-testing purposes, the LHSC Policy admonished those persons not to give or sell such kits to other persons or falsify test results. The Policy advised that failure to heed this admonishment ***might result in discipline, up to and including termination***.

14. The LHSC Policy went on to outline the general procedure to be followed by "area leaders", staff and affiliates", and "Occupational Health and Safety Services".

15. Item 2.2.2.3 instructed affected staff and affiliates to "*apply for Accommodation under Human Rights to People and Culture*".

16. Item 2.3 directed Occupational Health and Safety Services to:

> 2.3.1 Promote the vaccination program and assist as needed in providing information to ensure all individuals have the information they need to make an informed decision
>
> 2.3.2 Provide data to generate compliance reports to verify COVID-19 Vaccination Program has been completed
>
> 2.3.3 Document staff and affiliate proof of COVID-19 vaccination in their Occupational Health file
>
> 2.3.4 Provide test kits to all staff and affiliates who are either medically exempt, or are deemed to be not vaccinated per this policy

17. Importantly, this procedure ***did not*** include any Items by which Occupational Health and Safety Services was directed to investigate or otherwise deal with requests for human rights exemptions.

The Applicant Attempts to Apply for a Human Rights Exemption, but is Summarily Denied

18. On September 22, 2021, the Applicant prepared and swore an affidavit, in which he requested a human rights exemption, which the LHSC Policy had indicated was available, based on "*creed and conscience*". "Creed" is, of course, a protected ground of discrimination under the Ontario *Human Rights Code*.

19. However, the Applicant was never subsequently interviewed or approached by LHSC with a view to investigating the Applicant's request for a human rights exemption, as he was permitted to seek under the LHSC Policy. LHSC took no steps whatsoever to determine whether the Applicant's request was valid.

20. Instead, approximately two weeks later, on October 5, 2021, LHSC sent the Applicant a brief e-mail denying the Applicant's request for an exemption. The e-mail made no attempt to refer to the Applicant's particular circumstances, nor did it refer to the Applicant's affidavit regarding his "*sincerely held convictions based on creed and conscience*". The e-mail also contained no explanation of why no effort was made to investigate the Applicant's particular request in the circumstances.

21. No other justification for the denial of the Applicant's request was provided.

The Applicant is Terminated

22. On October 13, 2021, LHSC management and the Applicant had a meeting, where LHSC informed the Applicant that his employment was terminated, effective October 22, 2021. The Applicant was advised that his termination was non-negotiable; he was not given any extra time to take the vaccine and bring himself into compliance with the LHSC Policy. This termination meeting was the first time that the Applicant was made to understand that his employment had in fact been in jeopardy.

23. On October 22, 2021, LHSC sent the Applicant a letter by registered mail (the "**Termination Letter**") and convened a Zoom video conference call with the Applicant, confirming that the Applicant was terminated.

24. Importantly, the Termination Letter ***did not*** address the Applicant's attempt to secure a human rights exemption, which had been summarily dismissed by LHSC. Nor did the Termination

Letter explain how the Applicant was meaningfully jeopardizing patients or other LHSC staff since he had been consistently working at home for many months.

25. The Applicant's last day at work with LSHC was on October 21, 2021. His relevant Record of Employment indicates that the reason for its issuance was "dismissal".

Subsequent Facts Leading to This Application

26. Subsequently, the Applicant applied for EI Benefits.

27. On January 11, 2022, the Commission sent the Applicant a letter, advising:

> You are not entitled to Employment Insurance benefits from October 24, 2021 because you lost your employment with LONDON HEALTH SCIENCES CENTRE on October 21, 2021 as a result of your misconduct.

28. On January 19, 2022, the Applicant filed a Request for Reconsideration of the Commission's decision.

29. The Commission's reconsideration decision was sent to the Applicant in a letter dated on March 3, 2022. In the letter, the Commission advised the Applicant that its decision to deny the Applicant's claim for EI benefits had not changed.

30. The Applicant then submitted a Notice of Appeal to the General Division, with supporting documentation, on or about March 14, 2022.

31. The Applicant's hearing before the General Division proceeded on July 7, 2022 by videoconference.

The Government's Policy with Respect to EI Benefit Claimants

32. The record before the General Division included, among other things, evidence of a policy instituted by the federal government concerning EI Benefits claims made by employees who had been terminated for failure to comply with an employer's COVID-19 vaccination policy (the "**EI/COVID-19 Vaccination Policy**"). This evidence (which was the best evidence available to

the Applicant at the time of the hearing in the General Division) was filed in the General Division as Document No. GD16.

33. Document No. GD16 includes the transcript of an interview that took place under the aegis of the CBC program "Power & Politics" on October 21, 2021 (the "**Power & Politics Interview**"). The interviewee was Carla Qualtrough, federal Minister of Employment, Workplace Development and Disability Inclusion.

34. Minister Qualtrough's message to the public during the Power & Politics Interview was that the federal government had already instituted, or would soon be instituting, the EI/COVID-19 Vaccination Policy, which meant that individuals who chose not to be vaccinated against COVID-19 would simply not be eligible for EI Benefits.

35. Minister Qualtrough did not provide any specific details. She did not explain how the federal government believed it was able, absent legislative amendment or other similar action, to direct the Tribunal to deny EI claims out of hand where the claimant had been terminated from their employment because of an unwillingness or inability to be vaccinated against COVID-19.

36. To the best of the Applicant's knowledge, the federal government has not amended the EI Act or otherwise modified the definition of "misconduct" to deny all claims for EI Benefits by claimants who are or were unwilling to be vaccinated against COVID-19.

The General Division's Decision

37. On July 26, 2022, General Division Member Solange Losier ("**Member Losier**") issued her decision, in which she dismissed the Applicant's appeal. In Member Losier's view, the Commission had proven that the Applicant lost his job because of misconduct. Accordingly, she concluded that the Applicant was not entitled to EI Benefits.

38. Essentially, Member Losier found that the Commission had proven that the Applicant had engaged in misconduct for the following reasons:

- **First**, because the Policy had been communicated to the Applicant
- **Second**, because the Applicant wilfully chose not to comply with the Policy
- **Third**, because the Applicant "*knew or ought to have known the consequences of not complying would lead to a dismissal*"
- **Fourth**, because the Applicant had not proven he was exempt from the Policy
- **Fifth**, because Member Losier "*generally accepted*" that the LHSC could choose to develop and impose policies at the workplace. She held that the LHSC imposed a vaccination policy which "*became a condition of his employment when they introduced the policy*"

39. Member Losier did not discuss the import of Document No. GD16 in the course of her decision.

Leave to Appeal Granted

40. The Applicant then filed an Application to the Appeal Division on or about August 24, 2022.

41. On October 14, 2022, Tribunal Member (Appeal Division) Charlotte McQuade ("**Member McQuade**") issued her decision (the "**Leave to Appeal Decision**"), in which she granted leave to the Applicant to proceed with his appeal. She observed that the Applicant had submitted that Member Losier had erred in law by not considering whether his rights guaranteed under the *Canadian Charter of Rights and Freedoms* were engaged when he refused to follow the LHSC's Policy, or erred in law by failing to provide sufficient reasons explaining why she did not deal with that issue.

42. Member McQuade further noted that the Applicant raised the argument that he was exercising his rights under ss. 2, 7, 8 and 15 of the *Charter* in refusing to comply with the LHSC

Policy, and that the Tribunal must interpret and apply legislation and policy in a manner that gives maximum effect to the *Charter*. The Applicant further argued that his refusal to comply with the Policy cannot form the basis for refusing his EI Benefits because such an interpretation is inconsistent with upholding his *Charter* rights.

43. Member McQuade observed that there was no mention of the above argument in Member Losier's decision. She concluded that "*[b]y not responding to the [Applicant's] argument concerning the engagement of his Charter rights at all, the General Division may have erred in law by providing insufficient reasons.*"

44. Member McQuade therefore granted the Applicant leave to proceed with his appeal. She did not limit the scope of the Applicant's appeal.

The Appeal Hearing; Supplementary Written Submissions

45. The appeal hearing before Member McQuade proceeded by way of videoconference on December 12, 2022. The Applicant was represented by counsel, Mr. James Manson. The Commission was also represented by counsel, Ms. Rebekah Ferriss.

46. During the hearing, Member McQuade asked counsel to provide her with additional to provide supplementary written submissions on the following three issues:

a) how the principles set out in *Paradis v. Canada (Attorney General)*, *Mishibinijima v. Canada (Attorney General)* and *Canada (Attorney General) v. McNamara* (i.e. when considering a "misconduct" case, the focus is on the employee's conduct, and not that of the employer) ought to impact her analysis in this case (if at all);

b) the Appellant's response, if any, to the Respondent's reliance on *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54; and

c) whether the Tribunal's task in this matter (i.e. determining whether the Appellant engaged in "misconduct" under the EI Act) involves the exercise of statutory discretion, which in turn requires the Tribunal to employ the well-known *Doré/Loyola* analysis.

47. Only two days after the hearing, on December 14, 2022, the General Division of the Tribunal released a decision in the matter of *Annette Lance v. CEIC*, File No. GE-22-1889. In the Applicant's counsel's view, the *Lance* decision addressed the very same issues facing the Tribunal in the Applicant's appeal and was instructive.

48. Accordingly, the Applicant's counsel included the *Lance* case and corresponding submissions, along with a request for the Tribunal to consider the new decision, in his supplementary written submissions to Member McQuade. These were all forwarded to her attention by e-mail on December 19, 2022 per the schedule agreed to by the parties and Member McQuade.

49. On January 5, 2023, the Applicant's counsel received the Commission's responding supplementary submissions, as requested by Member McQuade.

The Applicant's Further Written Submissions

50. On January 9, 2023, the Applicant's counsel wrote to the Tribunal, attaching another newly released decision by Member Elizabeth Usprich of the General Division of the Tribunal. This decision had been released on January 3, 2023, and hence could not have been included either in the Applicant's original representations or in its supplementary written representations dated December 19, 2022.

51. The Applicant's counsel took the position that the issues raised in this new decision were virtually identical to the issues raised in the Applicant's case. In fact, the employee in this new case worked for the same employer and was subject to the same policy as the Applicant was in this case. Accordingly, the Applicant's counsel asked the Tribunal to consider this additional decision and the underlying documents filed with it.

52. No response was ever received from the Tribunal, whether agreeing or refusing to consider this new decision.

Member McQuade's Decision

53. Member McQuade's Decision is dated February 17, 2023. The Decision was sent to the Applicant's counsel on February 20, 2023; the covering e-mail provides that the Decision is deemed to be received on the following day.

54. Member McQuade dismissed the Applicant's appeal in its entirety. She rejected every single argument advanced by the Applicant's counsel.

55. While Member McQuade did advise that she accepted the Applicant's submissions on the *Lance* decision for consideration, she nonetheless purported to distinguish *Lance* from the Applicant's case.

56. Member McQuade did not refer at all in the Decision to the additional case forwarded to the Tribunal on January 9, 2023. Nor did she refer in any way to the EI/COVID-19 Vaccination Policy, as discussed during the Power & Politics Interview, as found in Document No. GD16.

The Decision is Unreasonable

57. The Decision is unreasonable for the following reasons:

(a) Member McQuade failed to consider the additional case forwarded to the Tribunal on January 9, 2023 by the Applicant's counsel, and failed to explain why she refused to do so;

(b) Member McQuade failed to consider the impact of the EI/COVID-19 Vaccination Policy, discussed during the Power & Politics Interview, as found in Document No. GD16;

(c) Member McQuade erroneously found that there was evidence before the General Division to conclude that complying with the LHSC Policy was a valid condition of the Applicant's employment;

(d) Member McQuade failed to acknowledge relevant employment law principles and appreciate that the Policy was void *ab initio* as it was unilaterally imposed on the Applicant with without any additional consideration flowing to the Applicant. As a result, the Applicant could not have been guilty of "misconduct" in not complying with the LHSC Policy;

(e) Member McQuade improperly attempted to distinguish the *Lance* case from the case before her, where it was unreasonable to do so;

(f) Member McQuade improperly concluded that the General Division's decision that complying with the LHSC Policy was a duty owed by the Applicant to his employer was consistent with both the law and the evidence before the General Division;

(g) Member McQuade failed to appreciate that the LHSC Policy, as drafted by the employer, was ambiguous, and that it was unreasonable for the General Division to have found otherwise. She also failed to employ the principle of *contra preferentem* in her analysis of the LHSC Policy. As such, the Applicant could not have been guilty of "misconduct" in not complying with the LHSC Policy;

(h) Member McQuade applied unreasonable and perverse logic in concluding that the Applicant knew that he "*could be dismissed*" on the very date of the meeting during which he learned, for the first time, that he was in fact being dismissed. As such,

the Applicant could not have been guilty of "misconduct" in not complying with the LHSC Policy;

(i) Member McQuade failed to appreciate that the Applicant had in fact attempted to comply with the LHSC Policy by applying for an exemption, but that the employer had failed to consider the Applicant's request outright. Member McQuade erroneously determined that the Applicant's employer had "*considered and refused*" the Applicant's request for an exemption, when the evidence demonstrates that it did not do so. As such, the Applicant could not have been guilty of "misconduct" in not complying with the LHSC Policy;

(j) Member McQuade failed to appreciate that the Policy was unreasonable, illegal and/or unconstitutional to the extent that it required an employee to take a medical treatment against his or her will, in violation of his or her *Charter* rights, without giving the employee any alternatives (such as self-testing). Furthermore, recent evidence from the Chief Medical Officer of Health of Ontario, Dr. Kieran Moore, confirms that the Ontario government never intended for policies such as the LHSC Policy to fail to provide employees with such alternatives. As such, the Applicant could not have been guilty of "misconduct" in not complying with the LHSC Policy;

(k) Member McQuade failed to appreciate that the unreasonable result of her analysis is that an employer is free to implement any policy whatsoever, including one that violates an employee's *Charter* rights, and that any employee who declines to

adhere to such a policy – even where the policy results in a violation of their *Charter* rights – will necessarily be denied their claim for EI Benefits;

(l) Member McQuade failed to appreciate that the discrete requirements of the "misconduct" test were never met in the Applicant's case;

(m) Member McQuade improperly held that the well-known *Doré/Loyola* analysis did not apply to the Applicant's case, and that it was accordingly unnecessary for her to employ the *Doré/Loyola* analysis and consider the Applicant's *Charter* rights in the circumstances of this case;

(n) in the alternative, if the *Doré/Loyola* analysis does not apply to the Applicant's circumstances, Member McQuade nonetheless failed to take the Applicant's *Charter* rights into account in the circumstances of this case and appreciate that it cannot amount to "misconduct" for an employee to assert his or her *Charter* rights in the face of an employer's policy, which assertion results in him or her being unable to comply with the policy;

(o) Member McQuade failed to appreciate that the common law test for "misconduct" was incomplete to the extent that it does not provide that an employee cannot be guilty of "misconduct" where that employee asserts his or her *Charter* rights in the face of an employer's policy, which assertion results in him or her being unable to comply with the policy, and must therefore be updated and/or modified accordingly to protect such employees when they apply for EI Benefits;

(p) Member McQuade improperly distinguished *P.C. v. Minister of Employment and Social Development*, 2016 SSTGDIS 99; *J.L. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 189; and *M.D. v. Minister of Employment and Social Development*, 2017 SSTADIS 553 from the Applicant's case; and

(q) such further and other grounds as counsel may advise and this Court permit.

THE APPLICANT RELIES ON THE FOLLOWING STATUTORY PROVISIONS:

(a) the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c. 11, including the *Canadian Charter of Rights and Freedoms*;

(b) *Employment Insurance Act*, SC 1996, c. 23;

(c) *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18.1 and 28(1)(g);

(d) *Federal Courts Rules*, SOR/8-106.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

(a) the Affidavit of Robin Francis, sworn TBD;

(b) the Supplementary Affidavit of Robin Francis, sworn TBD;

(c) the contents of the Tribunal record before Member Losier, which record was also before Member McQuade;

(d) the parties' main and supplementary written submissions prepared for the Appeal;

(e) the Applicant's additional written submission to the Tribunal, dated January 9, 2023, with attachments;

(f) all documents produced by the Tribunal in response to the Applicant's Rule 317 request, above;

(g) the Decision; and

(h) such further and other evidence as the lawyers may advise and this Court may permit.

RULE 317 REQUEST FOR MATERIAL IN THE TRIBUNAL'S POSSESSION

The Applicant requests that the Tribunal and the Respondent send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Tribunal and the Respondent to the Applicant and to the Registry:

(a) all materials in the Tribunal's and the Respondent's possession pertaining in any way to the EI/COVID-19 Vaccination Policy, including directives, memos, guidance or emails concerning EI Benefits claims made by employees who had been terminated for failure to comply with an employer's COVID-19 vaccination policy provided by or prepared for Canada Employment Insurance Commission, The Social Security Tribunal of Canada or the Minister of Employment, Workplace Development and Disability Inclusion.

March 22, 2023

JAMES MANSON, BARRISTER
[redacted]

James Manson (LSO #54963K)

T: [redacted]
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Lawyer for the Applicant

ROBIN FRANCIS Applicant	-and-	**CANADA (ATTORNEY GENERAL)** Respondent	Court File No.

FEDERAL COURT OF APPEAL

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPLICATION

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Counsel for the Applicant, Robin Francis